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Indiana Law Journal

Volume 3 | Issue 5

Article 3

2-1928

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Recommended Citation

Willis, Hugh Evander (1928) "When is a Business Affected by a Public Interest?," *Indiana Law Journal*: Vol. 3: Iss. 5, Article 3.
Available at: <http://www.repository.law.indiana.edu/ilj/vol3/iss5/3>

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COMMENTS

WHEN IS A BUSINESS AFFECTED WITH A PUBLIC INTEREST?

When is a business affected with a public interest, so as to become what is called a public calling, and to be subject to the public calling obligations: to serve all of the class of service, with reasonably adequate facilities, for reasonable compensation and without discrimination? What is the test of public calling?

In the early Strict Period in Anglo-American law, all businesses were common callings. The thing which made a calling common was the fact that it was pursued as a business, and not occasionally by special agreement, or as a casual act.¹ Even at this early date all common callings were bound to two obligations at least: to perform their service in a workmanlike manner after entering upon performance, and to serve all who applied.

The obligation to perform in a workmanlike manner was not peculiar to public callings. Anyone who undertook to perform for another was liable to the latter in an action on the case, or in special assumpsit, if he relied upon the undertaking to his injury. This law still survives in modern law in cases of gratuitous promises to convey land, to grant a license, to make a charitable subscription and to make other gifts, gratuitous undertakings of bailees, and waivers; where, upon the principle of promissory estoppel, promisors are held liable on their promises though not supported by any consideration under the bargain theory.² The distinction between the common callings and ordinary cases was this, that in ordinary cases parties could not be held liable without an express special assumpsit, while common callings could be held without laying an assumpsit, on the allegation that they were common callings.³

The obligation to serve everyone arose either as a result of the implied general assumpsit from the holding out to serve⁴ or as

¹ Adler, *Business Jurisprudence*, 28 Harv. L. Rev. 135, 152, 158; Burdick, *Origin of Public Service Duties*, 11 Col. L. Rev. 514, 522; Arterburn, *Origin and First Test of Public Callings*, 75 U. of Pa. L. Rev. 411, 419.

² American Law Institute, *Contracts Restatement*, Sec. 88, and *Commentary*, Sec. 88.

³ Holmes, *The Common Law*, 184.

⁴ Burdick, *Origin of Public Service Duties*, 11 Col. L. Rev. 522.

a result of affirmative legislation imposing for economic reasons such obligation upon all those in common callings.⁵ The obligation did not arise as a result of monopoly, although monopoly conditions undoubtedly generally prevailed in common callings at this time.

In the Period of Equity, or soon thereafter, when the number of businesses had greatly increased, a division between public and private arose; the law of common callings became a law of public callings—that is callings subject to the control of the state as distinguished from those that were followed as a business; the obligations to serve for reasonable compensation and to furnish reasonably adequate facilities arose; and the law of public callings, largely due to the influence of Lord Hale, was apparently placed on the basis of virtual monopoly.⁶ However, it has been suggested that the public control of this period should be explained on the theory of public grant of franchises, power of eminent domain, exclusive privileges, or financial aid upon condition of public service.⁷

In the Period of Maturity the law of public callings retired to the background and was largely supplanted by the new doctrines of freedom of contract, *laissez faire*, competition and individualism.⁸

With the modern Period of Socialization the law of public callings was again revived, and in the United States especially has had remarkable development. Herein only the decisions of the United States Supreme Court will be traced.

In the case of *Munn v. Illinois*⁹ the Supreme Court held that the grain elevators of Chicago were affected with a public interest so as to make their charges subject to regulation, because of virtual monopoly in a business where the owners were in a

⁵ Arterburn, *Origin and First Test of Public Callings*, 75 U. of Pa. Law Rev. 420.

⁶ Hale (1609-1676) *De Jure Maris*, 1 Harg. Tracts 6; Hale, *De Portibus Maris*, 1 Harg Tracts 78; *Allnut v. Inglis* (1810), 12 East 527; *Bremner v. Williams* (1824), 1 C. & P. 414.

⁷ Burdick, *Origin of Public Service Duties*, 11 Col. L. Rev. 529, 755; *Tyson v. Banton*, 47 Sup. Ct. 431. In the United States, with the doctrine of due process of law which obtains here, grants of privileges, franchises, power of eminent domain, and financial aid can hardly be a basis for putting a business into a public calling, for a business would have to be a public calling so as to give a public purpose for taxation or public use for eminent domain before such grants would be legal—17 Harv. L. Rev. 217, 222.

⁸ Willis, *Introduction to Anglo-American Law*, 117.

⁹ (1876) 94 U. S. 113.

position to impose a common charge. Lord Hale's test of virtual monopoly consequently was adopted but perhaps with a slight modification.

In the case of *Budd v. New York*¹⁰ another grain elevator case, the United States Supreme Court apparently made the test of public calling what looks like a series of operative facts—the nature and extent of the business, the existence of virtual monopoly, the fact that the business was rendered possible only by a canal built and maintained at public expense, the interest to trade and commerce, the relation of the business to the prosperity and welfare of the state, and the practice of legislation in analogous cases. Here the test of virtual monopoly was modified by other things which might be called matters of importance to the public, and historical considerations.

In *Brass v. North Dakota*¹¹ the Supreme Court held the grain elevators in North Dakota to be public callings, where there was no monopoly, upon the ground of legislative declaration. Here the Supreme Court almost abandoned the test of virtual monopoly and went back to what perhaps was the origin of the public calling obligations,—legislative declaration. The opinion certainly denuded the test of public calling, at least for the time being, of the idea that there must be virtual monopoly to have a business affected with a public interest.

¹⁰ (1892) 143 U. S. 517, affirming *People v. Budd* (1889), 117 N. Y. 1. Justice Andrews in the New York case also clearly states that his decision does not rest on the basis that control is a survival, or on the basis of special privileges conferred.

¹¹ (1894) 153 U. S. 391.

Brass v. Stoezer is the high water mark of the doctrine of legislative declaration in the law of public callings. However as high a mark in state declaration was reached in the law of taxation in the case of *Green v. Frazier*, (1920) 253 U. S. 233. The United States Supreme Court is not liable again to give so much weight to mere legislative or state declarations. Nevertheless, the initiation of action along the line of subjecting individual liberty to social control will continue to lie with the legislatures. The Supreme Court will continue only to apply the breaks when it thinks legislation is moving too fast. At first legislative labels were rather freely permitted when the attempt was merely to enlarge the category of common carriers. In this way telegraph companies, telephone companies and pipe line companies [*The Pipe Line Cases*, (1914) 234 U. S. 548] became common carriers and public callings, but in the case of common carriers the Supreme Court finally took the position that a private carrier could not be made a common carrier by mere legislative fiat, but that the individual must devote himself to common carriage before he can be made a common carrier. *Frost v. Railroad Commission*, (1926) 271 U. S. 583. If new

In *German Alliance Ins. Co. v. Lewis* (Kansas)¹² the Supreme Court held the business of fire insurance to be a public calling because of its peculiar relation to the public due to the indispensable nature, or the practical necessity, of the business of fire insurance to the public, together with the monopolistic character of the business found in the absence of liberty of contract in the fixing of the price of insurance, and not because of special privileges conferred; but it did not overrule the case of *Brass v. North Dakota*. The test here was a twofold test of indispensable service and virtual monopoly (something as in the case of *People v. Budd*).

In *Block v. Hirsh*¹³ the Supreme Court held that the business of housing at least in times of emergency, is a public calling with the obligation to serve a class, for reasonable compensation, on the ground of monopoly in a necessary of life. This is another case which seems to adopt a twofold test of monopoly and indispensable service, or practical necessity.

In *Wolff Packing Co. v. Court of Industrial Relations*,¹⁴ the Supreme Court, while declining to decide whether all the businesses declared to be affected with a public interest by the Kansas Industrial Court Act were so affected, because even so they could not be regulated so as to compel continuity of the business,¹⁵ held that a business can not be made affected with a public interest by legislative declaration^{15a}—thereby indirectly overruling *Brass v. North Dakota*—but that to be affected with a public interest a business must either (1) be carried on under a grant of privileges which expressly or impliedly imposes the affirmative duty of rendering a public service, or (2) be an occupation which has survived the period when all trades and callings were regulated, or (3) have a peculiar relation to the public because

businesses are to be made public callings hereafter it evidently must be outside of common carriers. With the approval that housing legislation received development in this field seemed very imminent, but with the clubbing the Kansas Industrial Court Act and the New York Theatre legislation received the development seems more remote. When the Supreme Court is conservative it relies upon the analytical and historical processes; when it is progressive, upon the philosophical process. It would seem that all three processes should be invoked in every case.

¹² (1914) 233 U. S. 389.

¹³ (1921) 256 U. S. 135.

¹⁴ (1922) 262 U. S. 522.

¹⁵ Yet the Supreme Court held that this could be done in the case of *Wilson v. New*, (1917) 243 U. S. 332.

^{15a} *Washington v. Kuykendall*, 48 Sup. Ct. 41.

of the indispensable nature of its service and the exorbitant charges and arbitrary control to which it might subject the public. The third part of this test can be assimilated to the test adopted in prior decisions of the United States Supreme Court.¹⁶ The second part of the test rests upon the common ground of historical precedent but can affect no new cases. The first part of the test has been suggested before, but as already pointed out has the difficulty in the United States that the grant of privileges itself must run the gauntlet of the due process clause before it can be the basis of any public calling obligations,¹⁷ and we may have to reserve our doubts about it until the Supreme Court declares some new business affected with a public interest solely on the ground of a grant of privileges. Hence, the test of public callings adopted by this case which is of practical importance is the third part of the test.

With the law in this state of uncertainty it was hoped that when the case of *Tyson v. Banton*¹⁸ came before it the Supreme Court would clear up all uncertainties and give us a final answer to the question of when a business becomes affected with a public interest, but we were doomed to disappointment. The case, as interpreted by the majority, involved the question of whether or not amusements were sufficiently clothed with a public interest to justify the regulation of the maxim prices of admission. The Court repeated that a business cannot be affected with a public interest by mere legislative declaration, and adopted the three-fold test of *Wolff v. Industrial Court* as to what would make a business affected with a public interest. The Court then found that the instant case, like the *Wolff* case, came under the third part of the test if at all, because there was no grant of privileges and no sufficient historical precedent; and was of the opinion that the business in this case did not come under the third part of the test, apparently because a theater does not render an indispensable service but is a private enterprise. Four justices dissented. Justices Holmes and Brandeis were ready to throw away judicial tests and leave the matter to legislative discretion as in *Brass v. North Dakota*. Justices Stone and Sanford were of the opinion that the conditions were sufficiently monopolistic and sufficiently essential to life to justify regulation.

¹⁶ *People v. Budd*, *supra*; *German Alliance Insurance Co. v. Lewis*, *supra*; *Block v. Hirsh*, *supra*.

¹⁷ Note 7.

¹⁸ (1927) 47 Sup. Ct. 426.

The decision again enthrones the doctrine of judicial supremacy, but it still leaves somewhat vague the judicial test as to when a business is affected with a public interest. Public interest control seems to be a penalty for unrighteous economic conduct. Is there any economic pattern into which public interest enterprises can be fitted? Can we delimit the field of business activity? Are Giant Power, the coal industry and the steel industry affected with a public interest? Are other trusts and monopolies public callings?

Will entertainment never be regarded as an indispensable service? All we can now with safety say is that in order to be affected with a public interest there must be a peculiarly close relation between the business and the public and that such close relation is found where there is virtual monopoly in an indispensable service. But when do we have a virtual monopoly and when do we have an indispensable service? *Tyson v. Banton* shows us that we are just embarking on an uncharted sea so far as concerns these questions.¹⁰

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¹⁰ It has also been suggested that price regulation is broader than the law of public callings, and that this broader price regulation is just as much due process of law as is the regulation of public callings and for the same reasons: (1) English practice prior to the adoption of our Constitution, and (2) police power. Rottschaeffer, *Field of Governmental Price Control*, 35 Yale L. J. 438; Isaacs' *The Revival of the Justum Pretium*, 6 Cornell L. Q. 38. But see *Fairmont Creamery Co. v. Minnesota*, (1927) 47 Sup. Ct. 506.